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UKRAINE AND THE EU AFTER UKRAINE'S PARLIAMENTARY ELECTIONS 2012: HOW TO BREAK THE STALEMATE?

Introduction. EU-Ukraine relationship under Yanukovych: from honeymoon to deadlock

Developments in Ukraine since February 2010 when Viktor Yanukovych became the President have exceeded many pessimistic expectations. The political instability and infighting during Yushchenko-Tymoshenko tandem produced a lot of disappointment and fatigue, therefore there were hopes that under Yanukovych better management and predictability were to be expected. Many analysts claimed that even if Yanukovych would decide to move too far in the direction of concentrating power, a lot of safeguards against potential authoritarian trends existed in Ukraine. It was argued that oligarchs became used to political competition and would not tolerate a one man rule; they would be the first ones to stand up and protect the liberties. It was also argued that the West, furthermore the EU, would strengthen its pressure and that no Ukrainian leader would be able to afford withstanding this pressure: the EU was too an important partner for a country like Ukraine that needed to balance against the big northern neighbour. Finally, it was believed, that civil society would at the very least draw the red lines beyond which no power man would be able to step and risk provoking social instability.³ Many of these hopes did not materialise.

Looking back at developments over the past two and a half years shows that Ukraine has lacked many constraints or safeguards outlined above. What Yanukovych has managed to 'achieve' during this time and how immune he has stayed to the external and domestic pressure is surprising. Ukraine's democracy performance as assessed by many international indices, such as Freedom House or Bertelsmann Transformation Stiftung has deteriorated significantly⁴. Ukraine's business climate, according to Doing Business rating, has also dropped significantly⁵. Ukraine's judiciary has found itself under the total political control. Freedom of assembly, freedom of expression along with many other indispensable political and personal freedoms have become seriously constrained, while corruption has reached an even higher scale. The 2010 local elections were not free and fair and marked a step back as compared to all elections Ukraine held since the Orange Revolution (December 2004). The most recent parliamentary elections that took place on 28 October

¹ The draft paper was presented during the Deutsch-Nordisch-Baltisches Forum 2012 in Helsinki on 27-28 September 2012 and amended after the parliamentary elections in Ukraine took place on 28 October 2012.

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³ See, for instance, Gromadzki, Grzegorz; Movchan, Veronika; Riabchuk, Mykola; Solonenko, Iryna; Stewart, Susan; Sushko, Oleksandr and Wolczuk, Kataryna. *Beyond Colours: Assets and Liabilities of 'Post-Orange' Ukraine*. Kyiv and Warsaw: International Renaissance Foundation and Stefan Batory Foundation, 2010. accessed 15 October 2012, <http://www.irf.ua/files/ukr/beyond%20colours.pdf>

⁴ *Freedom in the World 2012*. Freedom House, 2012. Accessed October 2012, <http://www.freedomhouse.org/report/freedom-world/freedom-world-2012>. Bertelsmann Transformation Index 2011. Bertelsmann Stiftung, 2012. Accessed October 2012, http://www.bertelsmann-stiftung.de/cps/rde/xchg/SID-8D417F3B-61EA1F72/bst_engl/hs.xsl/307.htm

⁵ *Doing Business 2013*. World Bank. Accessed October 2012, <http://www.doingbusiness.org/>

2012 also saw major manipulations during the election campaign, on the day of voting and even during the counting and tabulation of votes. Yanukovych has de facto established a one party rule, while oligarchs have agreed to play by his rules. The EU has appeared to matter little to Yanukovych in the context of his domestic power agenda. Domestic opposition and activities of civil society have mattered, but only to a limited extent. They insured alternative opinions and sometimes succeeded in promoting or blocking certain decisions, but have had marginal impact on undermining the system as such.

These developments have had profound implications for EU-Ukraine relationship. The EU has reacted with disappointment and warnings, although belated. For instance, the EU did not react to early warning signals, such as the creation of the parliamentary coalition with major procedural violations in April 2010 or the adoption of legislation on judiciary in May-June 2010 that strengthened political control over judiciary. Amending the Constitution by a mere decision of the court in September 2010 that brought Ukraine back to the presidential system was another step. Yet the red line, which brought the EU-Ukraine relationship to the stalemate was that of selective justice. The imprisonment of some ten former Ukrainian officials, but most of all the former prime-minister and the leader of opposition Yulia Tymoshenko was the step the EU could not tolerate. Even worse, Yanukovych created an impression that he was willing to 'correct the mistake' and the fact that this impression was false was the last drop.

Due to these developments, further progress in EU-Ukraine relationship has been put on hold. In December 2011 the EU and Ukraine announced that they finalised negotiating the Association Agreement (AA). The AA was initialed in March and July (the DCFTA part) 2012. Yet, the EU has delayed the decision about signature of the AA. The EU also postponed the EU-Ukraine Summit – an event, which took place annually since 1997 when the PCA with Ukraine came into force. As the result no Summit will take place in 2012, although according to the official version it was postponed till early 2013.

The parliamentary elections that took place on 28 October 2012 are perceived as an important benchmark by the EU. The way the EU ultimately assess the elections will serve as an important reference point for the subsequent policy towards Ukraine. While the EU is supposed to take the decision on November 19 – this is when the EU foreign ministers meet, the OSCE has already given a fairly critical preliminary assessment⁶. Previously the EU mentioned that the OSCE assessment will be crucial for the EU's own standpoint.

Apart from the importance of the quality of elections the EU has never put forward a concise list of criteria under which it would be ready to move towards signing the AA. Yet, looking at different media statements by Commissioner Füle and other EU officials it can be inferred that two other conditions are implied – dealing with selective justice (read: release of 'political prisoners' Tymoshenko and Lutsenko) and implementation of Association Agenda⁷ priorities, particularly carrying out the reform of judiciary.

⁶ *International Election Observation. Ukraine – Parliamentary Elections, 28 October 2012. Statement of Preliminary Findings and Conclusions.* OSCE/ODIHR. Accessed October 2012, <http://www.osce.org/odihr/elections/96675>.

⁷ Association Agenda is the second generation Action Plan between the EU and each of its Eastern Partnership neighbour. Ukraine started implementing the Association Agenda in 2010. Its priorities are being updated annually.

The way the elections and especially the vote counting were carried out significantly limits the space for manoeuvre for the EU. It is clear that the elections were not free and fair. Moreover the imprisoned leaders of political opposition were not let free. In this situation the EU cannot continue 'business as usual' and go forward with the Association Agreement, but look for a 'Plan B' for Ukraine.

The EU's dilemma: the EU's 'transformative power' and Eastern Partnership Policy under the risk

Due to Ukraine the EU faces a profound dilemma, which extends beyond EU-Ukraine relationship as such, but touches upon the entire Eastern Partnership policy. Ukraine used to be the flagship country of the European Neighbourhood Policy and later on that of the Eastern Partnership. Now it is lagging behind Moldova and Georgia not only in the domain of democracy, but on many other aspects of Europeanisation as confirmed by independent expert assessments⁸. Ukraine was the first EaP country with whom the EU started negotiating its unprecedented Association Agreement. The latter entails deep and comprehensive free trade area and *acquis* approximation that comes near to the level of commitments the accession countries normally have to undertake. The AA with Ukraine was supposed to serve as a model agreement for other EaP countries. Moreover, the AA is perceived to be the most important instrument offered by the Eastern Partnership policy. Therefore, the AA with Ukraine was supposed to serve as the 'success story' of the EU's policy towards its Eastern neighbours.

In this situation, on the one hand, the EU cannot compromise on its values by going forward with signing the Association Agreement with Ukraine. This is especially true now after parliamentary elections were not recognised by OSCE as such that met democratic standards. Moreover, obvious abuses took place during the vote count and tabulation: the Party of Regions candidates were recognised as winners in several single-mandate constituencies where de facto oppositional candidates won. Wide-spread reporting of abuses and protests on the ground did not help to ensure the ultimately fair outcome.

Importantly, such a move on the part of the EU would undermine its 'more for more' principle, which was put at the basis of its European Neighbourhood Policy. Thus, signing the AA with Ukraine will not only undermine EU's credibility, but might also send wrong signals to other countries as to what standards of democracy the EU expects from a country with which it is ready to sign the Association Agreement.

On the other hand, without the AA the EU might risk losing any leverage over Ukraine. The potential 'Plan B' has never been discussed. The question of what the EU can do\ what would be the right alternative policy if the EU decides that signing the AA under the current conditions would be inappropriate, remains open. What other leverages, if any, does the EU have to promote reforms in Ukraine? At the same time the AA as a legally binding framework might help to push forward implementation of EU standards. Thus, the EU faces the choice between, on the one hand, 'loosing face', but potentially preserving some leverage over Ukraine and, on the other hand, being consistent and guided by principles, but losing any leverage altogether.

⁸ See European Integration Index for Eastern Partnership Countries - www.eap-index.eu

The whole situation also questions the EU's 'transformative power' towards countries like Ukraine. It shows that the attractiveness of the Association Agreement is weak and the cost of potential isolation from the EU is not big enough from the perspective of domestic power struggle in Ukraine.

Beyond the specific Ukrainian dilemma the question of the future of the Eastern Partnership remains open. Without having the precedent of the AA concluded with one of the EaP countries the EU risks to compromise the credibility of its EaP policy. Since the EaP was launched in 2009 there has been hardly a success story the EU can sell. There is already a lot of disappointment with the policy in the EU. If no success story is created, things might become problematic.

What would be the way out? The next chapters of this paper offer a closer look at developments in Ukraine focusing on interests of different domestic actors and some down-to-earth processes and suggest the possible strategies for the EU.

Understanding developments and trends in Ukraine: diversity of actors as a chance

In order to better understand which way Ukraine is actually heading and subsequently discuss possible actions on the part of the EU, one has to look beyond developments in Ukraine that have to do with Yanukovych and his policy, but look at the variety of actors, interests and trends in Ukraine at different levels. Even if the EU's direct leverage with respect to political elites (the incumbents and more specifically Yanukovych and his 'family'/'clan') might be limited, the EU has the chance to influence indirectly by empowering those groups/actors that lose from the lack of reforms and the stalemate in EU-Ukraine relations. By empowering those actors the EU can promote the change from within. Moreover, the EU can support development of institutions, procedures and good practices at different levels that would bring results once the political climate changes. This is a long-term strategy, which can bear fruits in the long-term perspective. Over-expectations after short-term successes and disappointments when things do not work are equally counter-productive.

Developments in Ukraine since Yanukovych became the president and his Party of Regions created the majority in the parliament show that the incumbent president is interested in further strengthening his power and monopolising Ukrainian political space. For the sake of this objective Yanukovych is ready to compromise relationship with the EU. The most recent electoral process and the vote counting, which were marked by heavy use of administrative resources, confirm this. Yet, Yanukovych's objective faces constraints that have to do with multiple actors in the country that might have other objectives. Even if those actors have so far refrained from or failed to prevent the monopolisation of power, they potentially limit Yanukovych's space for manoeuvre. The EU needs to think how it can use these multiple actors in its policy towards Ukraine.

Oligarchs – business-political elites who largely control the situation in the country would be the first group of actors to consider. Although the widely-shared hope of many analysts before Yanukovych became the President that oligarchs will serve as the safeguard against the monopolisation of power did not prove to be true, oligarchs are playing the double game. On the one hand they agreed to play by the rules set up by Yanukovych. They stay away from politics in the sense that they do not create any public political opposition to Yanukovych as long as their business interests are satisfied (for instance, through non-transparent privatization or access to public funds). On the other hand the

most recent parliamentary elections showed that there was no coordinated strategy by oligarchs aimed at supporting the ruling Party of Regions. The oligarchs have rather promoted their own candidates with the objective to diversify channels of influence on the legislature. Thus, according to one journalist investigation⁹, since the Party of Regions is mostly dominated by the people loyal to Renat Akhmetov, Ukraine's richest man, the so-called 'gas lobby' in Ukrainian politics represented by, inter alia, Ukraine's media magnat and former security chief Valeriy Horoshkovsky, partially supported oppositional UDAR party headed by prominent boxer Vitalii Klychko. At the same time, another Ukrainian oligarch Viktor Pinchuk, who is known for his pro-European orientation and the annual high-level meetings in Yalta¹⁰, has secured his candidates in different party lists and in single-mandate constituencies. This speaks for the fact that the oligarchs are diversifying channels of influence in the parliament and might play their own game, not that of Yanukovych and his 'family' if needed. Business interests of some oligarchs are linked with the EU and its market, some of them have started investing in production standards demanded by the EU. Indefinite postponement of the Association Agreement as the result of Yanukovych's policy might not be in their interest.

The political opposition has shown some signs of consolidation in Ukraine. There was an attempt to coordinate efforts and agree on single candidates in single-mandate constituencies. After the elections the three oppositional parties that made it to the parliament tried to come up with a joint action plan as a reaction to brutal falsifications with the vote counting and mobilise voters to protest. If these efforts succeed, the opposition might have a sufficient number of votes to withstand the majority coalition of the Party of Regions and the Communists. This consolidation might be superficial and short-term. It is not clear whether the opposition will be able to jointly insist and win the case of 13 single-mandate constituencies where de-facto oppositional candidates won, yet the victory of the ruling party candidates was announced. It is also not clear whether the opposition will stay together once the new parliament is formed. A more long-term problem with the current political opposition is that so far it has offered no ideological and substantive opposition. It has failed to offer alternative vision and substance to many developments in Ukraine promoted by the Party of Regions since Yanukovych became the President. Moreover, most oppositional leaders and members of opposition cannot be considered to be new quality political elites. In most cases they are also backed up by oligarchs and held high level decision making positions in previous governments. The relatively new players – far-right party Svoboda and the party led by the prominent boxer Vitalii Klychko UDAR that have made it to the parliament for the first time might be regarded as the exception. Yet, any conclusions at this stage are premature and the work in the parliament will become the reality check. The main function of the opposition in the new parliament will be that of ensuring political competition, promoting initiatives and legislation that would bring Ukraine closer to the EU and withstanding attempts of the Party of Regions to strengthen authoritarian trends in Ukraine. It remains to be seen whether the opposition proves capable of performing these tasks. Importantly, the political opposition can be considered as more EU-oriented than the Party of Regions. Their rhetoric and political programmes refer to the EU, while their electorate, mostly in Kyiv, Western and partially Central Ukraine is largely pro-European.

⁹ Leshchenko, Sergii. "Ukrainian Elections: the Oligarchs are Hedging Their Bets," *Open Democracy* (24 October 2012), accessed October 27, 2012, <http://www.opendemocracy.net/od-russia/sergii-leshchenko/ukrainian-elections-oligarchs-are-hedging-their-bets>

¹⁰ See Yalta European Strategy for more details – accessed October 25, <http://yes-ukraine.org/en/Yalta-annual-meeting>.

Civil society in Ukraine has become more active than ever before. To some extent the regime of Yanukovych has provoked mobilisation of civil society. Particularly, the human rights community, journalists and anti-corruption organisations had to react to negative developments with the freedom of media, freedom of assembly and public procurement practices that led to big amounts of public money ending up in private pockets. The 2012 parliamentary elections were seen as an important test for the maturity or lack of democracy in Ukraine, the real intentions of the regime and the quality of political opposition. Therefore numerous civil society election-related initiatives were launched and proved to be successful. As the very least, Ukrainian civil society has managed to provide regular and detailed updates on the electoral campaign and the day of voting. Due to internet and social networks information was quick and easily available. It is true, that although active and vibrant, civil society has so far had limited impact on the reform process and preventing consolidation of Yanukovych's power. Reaching out to people has also remained problematic. Yet, it offers alternative information and views on developments in Ukraine that partially have impact on public opinion and limits the space for manoeuvre for political elites. This group of actors is explicitly pro-European. Civil society actors refer to EU standards and practices in their work and have built a tense network of working contacts with counterparts in the EU, be it donors, decision-makers or civil society organisations. They can be regarded as agents of change and Europeanisation in Ukraine.

This constellation of actors and interests in Ukraine represents a very diversified landscape and plurality of visions as to which way Ukraine should be moving. Although Yanukovych and his immediate entourage have managed to promote and consolidate the model that best serves their particularistic interests, alternative opinions have existed and shaped the public discourse. This diversity of actors is the resource the EU should encourage and rely on. Among those actors the EU can find reform partners who can promote Ukraine's Europeanisation and might be able to challenge the regime in the long-term perspective.

After October 2012 elections: how to move forward?

One of the mistakes the EU has tended to make with respect to Ukraine is that of creating overexpectations, which are naturally followed by disappointments. Those are often created based on some short-term developments in Ukraine without having an in-depth look at the potential and basis for long-term changes. For instance, after the Orange Revolution or after Yanukovych became the President overexpectations were related to speedy democratisation and Europeanisation in the first case and more predictability and stability in the latter case. None of the expectations materialised due to prevalence of particularistic interests and lack of political will to promote reforms and create institutions that would safeguard long-term changes. Overexpectations were created based on wishful thinking or some normative assumptions as to how things should be. Overexpectations produced strong disappointment and fatigue on the part of the EU once it became clear that things were not moving in the right direction. This happened with respect to the Orange authorities some years after the Orange Revolution due to constant political infighting and with respect to Yanukovych once it became clear that he was ready to compromise relationship with the EU in order to promote his domestic power agenda.

The EU should get away from this approach, which reflects a rather short-term thinking. No new authorities that come to power in Ukraine can be committed to democratic rules of the game until the system of checks and balances is functional and embedded in institutions. Whatever political elites come to power in Ukraine, there will be numerous factors that will hinder political will. Unless institutions that create a level-playing field for political elites are set up and start functioning, there are too few reasons to expect a new quality reform process in Ukraine. Under these circumstances, ups and downs in domestic developments in Ukraine and possible abuse of power are only natural and have to be accounted for. In this situation the EU needs to be consistent with its offer (incentives), keep reiterating the conditions under which the offer can be given and be serious about the principles that have to be respected.

What does this mean for the immediate context after the parliamentary elections took place in Ukraine?

There is no way for the EU to go forward with signing the Association Agreement with Ukraine. Parliamentary elections were carried out with major violations and there is no sight of political will to follow up on the EU demands, such as release of political prisoners and reform of judiciary. By signing the AA with Ukraine the EU will compromise on its principle of shared values. The EU will also undermine its 'more for more' principle. At the same time Moldova and Georgia have emerged as success story. Moldova is well on track and has good chances to conclude AA negotiations this year. The EU needs to support this process and possibly sign the AA with Moldova ahead of the Eastern Partnership Summit to be held in Vilnius in autumn 2013. If the new government in Georgia shows political will and readiness to carry out reforms, the EU should sign the AA with Georgia once the negotiations are over. These developments will show the EU's transformative power and the work of the more-for-more principle. They will create the context where it will become clear to Ukraine that there is a cause-effect relationship between the domestic reform process and closer ties with the EU. Such developments in Ukraine's immediate neighbourhood will inevitably stimulate changes in Ukraine. In other words, the EU can encourage constructive competition among its Eastern Partnership neighbours to compliment and support its bilateral work with each neighbour.

Yet, what would be the 'Plan B' for Ukraine? In the current Ukrainian situation the incentives are clear. In the short term perspective the Association Agreement with the Deep and Comprehensive Free Trade Area as its integral part and delivery of financial assistance that was put on hold¹¹ are at stake. In the longer run one can talk about visa free travel through implementation of the Visa Free Action Plan. At the same time the conditions under which the incentives can be delivered have been communicated in a very vague way. Thus, the EU needs to reiterate the incentives and outline clear conditions for delivery of these incentives. Both the substance of the conditions and the way they are communicated are important. Where the substance is concerned, the conditions have to be very specific and measurable. Where communication is concerned, those have to be brought to the attention of society, not just political elites. The society has to know the price (what it has to lose) of the lack of political will and stagnation of reforms.

¹¹ The EU put on hold 610 million Eur of macro-financial assistance and over 200 million Eur that are a part of the direct budget support. The main reason was the public procurement legislation and practices that are against European standards, but also lead to large-scale misuse of public funds. According to some media information the EU was ready to consider delivery of the funds under the condition of free and fair parliamentary elections in Ukraine.

Thus, once the new parliament starts working, the EU should make it clear that the Association Agreement is on the table. Once the AA is signed and comes into force, it will create a new quality framework for the EU-Ukraine relations. The EU needs to work on communicating the benefits of the Association Agenda to the society and encourage the Ukrainian government to communicate the relevant information (up to publishing parts the text of the AA) to its people. Yet, the EU cannot sign the documents unless certain specific conditions are met. As mentioned above, the content and the way in which the conditions are communicated are equally important. Where the content is concerned, the EU can again stress the problem of selective justice and demand the release of oppositional leaders, as this condition was communicated long ago and has so far not been fulfilled. Secondly, the EU needs to communicate specific reform areas of the Association Agenda that should be in the focus. Those have to do with fundamental freedoms and human rights, judicial reform, business climate and transparency of public spending. Those have become the most problematic areas in the recent years and have led to major criticism on the part of domestic civil society and international actors, primarily the EU, Council of Europe and the World Bank. Where communication is concerned, it is not enough to communicate those to political elites via diplomatic channels. More importantly, those should become an instrument of domestic advocacy and pressure on the part of society and reform-minded groups.

A good way to combine a concrete substance and good communication would be something similar to the Commissioner Füle's Matrix of 2010 – specific, clear and doable reform steps that the EU expects Ukraine to implement after the elections. Subsequent developments should be monitored. The mistake with the Füle's Matrix was that it was not delivered publicly (although it was leaked to media), it was not presented as reiteration of the offer and conditions that were already on the table, but rather as something new or supplementary, and it was never followed up (monitored) by the EU itself. Additionally, the leverage of the document was weakened by the fact that it was presented as the invention of the Commissioner Füle, not the instrument agreed by the EU. The importance of such a document cannot be overestimated, as this would serve as an important reference point for the society and reform-minded actors and encourage domestic pressure for reforms.

Long term policy towards Ukraine should be aimed at supporting development of the critical mass of actors, institutions and practises that are reform-minded. Results cannot be expected overnight. Such a policy would include day-to-day involvement and reactions (including public reactions) to developments in Ukraine. Constant pressure on the part of the EU in itself might not make a big difference, but it would inevitably limit the space for manoeuvre for the incumbents and at the same time strengthen the already existing domestic pressure. Given the multiple actors with different interests in Ukraine, as outlined above, the EU needs to diversify its tools to take account of those actors. In short, limiting the space for manoeuvre for veto players and help to strengthen the power base of reform-minded actors should be a long term strategy of the EU.

Simultaneously the EU should continue supporting reform efforts in those areas, which are less contested and some progress has been achieved. In most cases these are down to earth and technical reforms. Once the political climate changes and Ukraine and the EU will be ready to sign the AA, better preparedness of institutions and some good practises will help to implement the AA. For instance, implementation of numerous technical standards which are important for the free trade area with the EU has become more active in Ukraine. Reforms related to requirements of the European Energy Community, more specifically the reform of the gas market, have gained some momentum. Reforms required

by the Visa Free Action Plan have good chance to be fostered after the new parliament is formed. The EU needs to support this down to earth sectoral Europeanisation thus preparing Ukraine for the future Association Agreement.

To sum up, given current developments in Ukraine, signing the Association Agreement would be unwise. As mentioned above, this would undermine the EU's credibility and potentially leverage towards all Eastern neighbours. The EU needs to go ahead with the more committed neighbours, namely Moldova and Georgia and announce clear conditions under which the AA with Ukraine could be signed. In the meanwhile the EU could support Europeanisation in different sectors, which are important for implementation of the Association Agreement.